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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
CHIBARDUN TELEPHONE COOPERATIVE, INC.	)	
CTC TELCOM, INC.	)	
	)	
Petition for Preemption Pursuant to	)	CC Docket No. 97-219
Section 253 of the Communications Act	)	
of Discriminatory Ordinances, Fees	)	
and Rights-of-Way Practices of the	)	
City of Rice Lake, Wisconsin	)	

REPLY COMMENTS
OF
MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation ("MCI") hereby submits its Reply in response to comments filed in the above-captioned proceeding.

I. THE FCC HAS JURISDICTION TO ENTERTAIN THIS PETITION IN ORDER TO DETERMINE WHETHER THE CITY OF RICE LAKE, WISCONSIN HAS EFFECTIVELY PROHIBITED CHIBARDUN FROM PROVIDING SERVICE

MCI would like to refute GTE's and the City's mistaken belief that the FCC does not have jurisdiction to entertain Chibardun's petition.[1] Section 253(a) empowers the Commission to preempt state and local legal and regulatory requirements that impede competitive entry, including ordinances and franchises. State and local governments that impose legal and regulatory requirements that are not competitively neutral are effectively erecting barriers to entry that impede new entrants' ability to provide telecommunications services.

The City, as well as GTE, take a very narrow view of what actions can prohibit or have

[1] Opposition of GTE to Petition for Section 253 Preemption, CC Docket No. 97-219 at 4 (filed Dec. 3, 1997) (GTE Opposition); City of Rice Lake's Comments on Petition and Motion to Dismiss or Deny, CC Docket No. 97-219 at 24 (filed Dec. 3, 1997) (Rice Lake Comments).

the effect of prohibiting the ability of competing local exchange companies from providing telecommunications services under section 253(a) of the Telecommunications Act of 1996 (Act). Section 253 was enacted "to ensure that no state could erect barriers to entry that would potentially frustrate the 1996 Act's explicit goal of opening local markets to competition."[2] In determining whether any state or local regulation has the impermissible effect proscribed by section 253(a), the Commission determines whether the regulation "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[3] Accordingly, under section 253 the Commission must "preempt not only express restrictions on entry, but also restrictions that indirectly produce that result."[4]

Various actions by local governments can certainly result in disabling a new entrant's ability of providing telecommunications service, especially delaying permission to use its rights-of-way. A competitor that cannot obtain permission to build facilities within a city's limits obviously cannot provide competitive local services. As the Commission has previously concluded, absent a franchise from cities, telecommunications providers lack the legal authority to enter the market and are legally barred from providing service.[5] Although the City does not have a final ordinance or License Agreement for review, the City withheld permission to excavate in return for Chibardun's agreement to the future ordinance. Further, it is indefensible for a municipality to delay issuance of a permit and then blame the new entrant for withdrawing

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[2] *Public Utility Commission of Texas*, FCC 97-346 ¶41 (rel. Oct. 1, 1997).

[3] *TCI Cablevision of Oakland County, Inc.*, FCC 97-331 at ¶ 98 (TCI).

[4] *Id.*

[5] *Id.* at ¶ 97.

its application[6] when the delay created a barrier to entry.

New entrants do not object to compensating municipalities for the use of their rights-of-way. Like GTE,[7] MCI believes that local governments are entitled to recover costs associated with the appropriate management of rights-of-way.[8] Emerging competitors should not, however, be used as a means for municipalities to correct any inadequacies in their current regulatory schemes.[9] Unlike GTE, Chibardun, MCI and other potential new entrants would be immediately subject to the ordinance requirements. Indeed, by its own admission, the City does not intend to apply any adopted ordinance to the incumbent's existing use of rights-of-way,[10] which is far more extensive than that planned by Chibardun.[11] The City is not on track to a fair and balanced legal and regulatory environment.

At a minimum, the Commission should seriously advise the City that its proposed ordinance does not comport with either section 253(a) or section 253(c). The need for this is

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[6] Rice Lake Comments at 31.

[7] GTE Opposition at 4.

[8] *See* TCI at ¶ 103.

[9] Rice Lake Comments at 6 ("when Chibardun announced its plans to build a telecommunications network within the City . . . the City recognized that it needed to assess its existing rights-of-way regulations and determine whether they were sufficient to protect the City's rights-of-way management and compensation interests"); League/Alliance Joint Comments at 9 ("When the City of Rice Lake received Chibardun's street opening permit applications . . . the City determined that its existing right-of-way regulations were inadequate . . .").

[10] Rice Lake Comments at 57.

[11] TCI at ¶ 108 ("when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis. Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.").

underscored by other comments that indicate that many municipalities in the State of Wisconsin are contemplating similar actions.[12] Even GTE, which opposed Chibardun's petition, views several provisions of the proposed ordinance as unlawful under section 253.[13] The City's proposed fee, for example, is $10,000. A fee of this size would serve as a *de facto* bar, to all but the largest providers.[14] While the cities may believe that they do not have to justify this fee to the Commission under section 253(c),[15] they must be prepared to demonstrate why such a fee does not constitute a barrier to entry under section 253(a).

As the League of Wisconsin Municipalities and the Wisconsin Alliance of Cities (League and Alliance) pointed out, municipalities have several options when faced with additional use of their rights-of-way by numerous telecommunications providers.[16] The favored approach by municipalities is to impose a comprehensive rights-of-way ordinance on a going-forward basis. This approach, however, is not competitively neutral because new entrants would be subject to more regulatory and financial requirements than the incumbent, which occupies far more of the

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[12] League/Alliance Joint Comments at 3.

[13] GTE Opposition at 8-10.

[14] It is not immediately apparent to MCI how Chibardun's request caused such a drastic increase in the City's costs. The City nevertheless expected Chibardun to agree to its demand. According to the City, its proposed License Agreement was simply a "negotiating position." Potential entrants into the market should not have to guess what requirements are real or which are just negotiating positions. Further, by admitting that the proposed License Agreement was simply a "negotiating position," the City conceded that the requirements therein were not necessarily related to management of the public rights-of-way -- either the City incurs certain costs or it does not. *TCI Cablevision of Oakland County, Inc.*, FCC 97-331 at ¶109.

[15] Rice Lake at 24; Comments of CMMT Communities, CC Docket No. 97-219 at 3.

[16] Comments on Petition by The League of Wisconsin Municipalities and the Wisconsin Alliance of Cities, CC Docket No. 97-219 at 7-9 (filed Dec. 2, 1997) (League/Alliance Joint Comments).

rights-of-way than any new entrant. At the outset, therefore, new entrants have an additional and discriminatory hurdle to overcome. Section 253(a) preempts state requirements that operate to protect the incumbent local exchange carrier by significantly deterring or burdening potential new competitors -- "a barrier may protect a market incumbent without completely excluding entry."[17]

Potential entrants should not be forced to enter into agreements not imposed upon incumbents currently using the rights-of-way. As the Commission has previously noted "[l]ocal requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory."[18] The City should allow new entrants into the rights-of-way under the same conditions under which the incumbent is allowed entry, and then require all occupants of the rights-of-way to sign the permanent agreement upon its completion.

Despite the City's declaration, it is hard for MCI to believe that Chibardun's proposed use of six miles of the rights-of-way threatened the City's entire infrastructure. Although the City references the need to address use of the rights-of-way by several telecommunications providers, the record reflects that only Chibardun requested an excavation permit. Indeed, the City admitted, it was only after Chibardun requested a permit did it see the need to revamp its right-of-way regulatory scheme.[19] As the Commission has previously stated, "governments that have historically refrained from engaging in substantive telecommunications regulation should

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[17] Phillip E. Areeda, et al., Antitrust Law ¶420a at 57 (1995).

[18] *TCI Cablevision of Oakland County, Inc.*, FCC 97-331 at ¶108.

[19] Rice Lake Comments at 31.

not view new entrants as being more susceptible to regulation than incumbents."[20]

If municipalities are so concerned with the viability of their rights-of-way to handle telecommunications providers, then any new regulations should apply to all existing and future use of the rights-of-way. If not, the new entrants will end up bearing the discriminatory burden of a city's failure to enact sufficient rights-of-way regulations. This type of regulatory environment would certainly work to impede competition.

MCI notes that the City devoted several pages to attacking Chibardun's motive for filing its request, MCI suggests that it is the City's motives that should be questioned. The City is in the process of revamping its rights-of-way requirements, a move that the City had not contemplated until Chibardun tendered its request for an excavation permit. Instead of granting Chibardun's request, the City wanted to exact from Chibardun, a commitment that it would comply with any subsequently adopted ordinance by the City, a commitment that was not required of the incumbent when it sought to occupy rights-of-way throughout the City and which on its face appears to patently discriminatory.

II. CONCLUSION

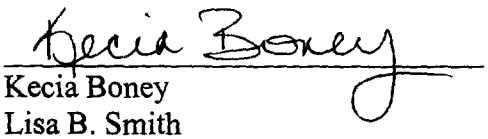
For the above reasons, MCI supports Chibardun's request that the Commission preempt the City of Rice Lake from: (1) adopting and enforcing any future right-of-way ordinances placing larger fees and more onerous conditions and restrictions upon new entrants; (2) otherwise engaging in practices which impose anticompetitive and discriminatory costs, delays and conditions upon Chibardun and any other telecommunications provider seeking to bring

[20] *TCI Cablevision of Oakland County, Inc.*, FCC 97-331 at ¶109.

telecommunications competition to the residents of Rice Lake; and (3) requiring a new entrant to agree to unknown conditions in order to obtain entry to that market.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION



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January 6, 1998

CERTIFICATE OF SERVICE

I, Mel Farrington, do hereby certify that copies of the foregoing Reply Comments were sent via first class mail to the following on January 6, 1998.

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